DOCKET NO. CV 18 6045442

CONNECTICUT CONFERENCE OF MUNICIPALITIES ET AL. : SUPERIOR COURT

V. : JUDICIAL DISTRICT OF NEW BRITAIN

PUBLIC UTILITIES REGULATORY AUTHORITY : NOVEMBER 12, 2019

DOCKET NO. CV 18 6045635

OFFICE OF CONSUMER COUNSEL : SUPERIOR COURT

v. : JUDICIAL DISTRICT OF NEW BRITAIN

PUBLIC UTILITIES REGULATORY AUTHORITY : NOVEMBER 12, 2019

DOCKET NO. CV 18 6045901

TOWN OF SHARON : SUPERIOR COURT

V. : JUDICIAL DISTRICT OF NEW BRITAIN

PUBLIC UTILITIES REGULATORY AUTHORITY : NOVEMBER 12, 2019

MEMORANDUM OF DECISION

Connecticut General Statutes § 16-233 provides as follows:

> Each town, city, borough, fire district or the Department of Transportation shall have the right to occupy and use for any purpose, without payment therefor, one gain upon each public utility pole or in each underground communications duct system installed by a public service company within the limits of any such town, city, borough or district. The location or relocation of any such gain shall be prescribed by the Public

> Utilities Regulatory Authority. Any such gain shall be reserved for use by the town, city ,borough, fire district of the Department of Transportation.

The "gain" referred to in the statute is a physical space on a utility pole or in an underground duct system to which a municipality or the state department of transportation (department) may affix communication wiring and equipment.

I

On September 28, 2017 four petitioners - the Communication Workers of America, a labor union, CTIA - The Wireless Assn., a trade association of wireless providers, the Southern New England Telephone Co. d/b/a Frontier Communications and the New England Cable and Telecommunications Assn., a trade association for cable television and broadband service providers (collectively, petitioners) - jointly requested that the defendant Public Utilities Regulatory Authority (authority) issue a declaratory ruling that the one free gain on public utility poles or in underground communications duct systems provided for use by municipal entities, pursuant to §16-233, is limited to the municipality's own use and may not be used by the municipality to provide broadband internet services to its residents and businesses, either directly or through commercial arrangements with

third parties.[1] Petition for Declaratory Ruling, Record p. 3.[2] The petitioners' request (petition) was initially opposed by the Connecticut Conference of Municipalities (CCM) and ultimately by the state office of consumer counsel (OCC) and multiple towns and cities.

After receiving written comments from the parties and other persons and organizations interested in the issues raised by the petition, the authority issued a proposed decision on March 6, 2018. Record p. 12. All parties, intervenors and other interested persons were afforded an opportunity to submit written exceptions to the proposed decision. Further, the authority heard oral argument concerning the proposed decision on March 16, 2018. A final decision was issued by the authority on May 9, 2018; Record

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[1] "Any person may petition an agency . . . for a declaratory ruling as to . . . the applicability to specific circumstances of a provision of the general statutes . . . ." General Statutes § 4-176(a).

[2] All citations to the record will be as it appears in *Office of Consumer Counsel* v. *Public Utilities Regulatory Authority*, Docket No. CV 18 6045635 (Docket entry #108).

p. 46; and it is from that decision that these appeals are taken,[3] pursuant to General Statutes § 4-183.[4]

These consolidated cases ask the question whether the statute's authorization of the use of the gain by municipalities "for any purpose" means what it says, i.e., that, save for illegal or dangerous uses, the authorized users of the gain may employ it to accomplish any goal of the user and, in particular, to provide broadband internet service for its residents and for commercial establishments within its borders. Or, is the apparent breadth of the language limited by considerations of the supposed effects of such a broad construction on the legitimate commercial interests of the petitioners? Along the way to resolving that question, the court must consider whether the authority has overstepped its legal authority in the methods it has employed to construe the language of § 16-233.

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[3] "A declaratory ruling . . . shall have the same status and binding effect as an order issued in a contested case and shall be a final decision for purposes of appeal in accordance with the provisions of section 4-183." General Statutes § 4-176(h).

[4] "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section."

II

In its final decision the authority saw itself as faced with two "possible and divergent constructions" of §16-233. Record p. 69. One construction, favored by the petitioners, would limit use of the gain by a municipality "solely for its internal telecommunications and broadband needs." Id. Those opposing the petition (appellants) argued that § 16-233's authorization of the municipalities' use of the gain "for *any* purpose" included its use "to provide broadband service to the public, whether directly or through commercial arrangements with third parties." Id.

The authority was "persuaded that both interpretations of [§ 16-233] are plausible." Id. Therefore, it found that the statute, as applied to this controversy, had no "plain and unambiguous meaning apparent on the face of the statute . .. ." Id. Accordingly, the authority decided that it "must look beyond the text of [§ 16-233] to interpret the meaning of the statute." Id. See *Webster Bank* v. *Oakley*, 265 Conn. 539, cert. denied 124 S.Ct. 1603 (2003). The one canon of statutory construction cited by the authority as guiding its interpretation of the statute was that enjoining courts to choose a construction of the statute that is an "effective and constitutional construction that reasonably

accords with the legislature's underlying intent" rather than a "constitutionally precarious" construction. Id. See *State* v. *Lutters*, 270 Conn. 198, 217 (2004). Id.

The authority proceeded to cite two sections of the federal Communications Act of 1934, 47 U.S.C. § 224 and § 253, as evidencing a congressional intent "to foster competition among telecommunications providers and prevent disparate treatment of one provider over another"; Id. ; and to prohibit state and local authorities from instituting "legal requirements that would inhibit any entity from providing any interstate or intrastate telecommunications service." Id., 70. The latter section, the authority stated, also provides that "a state may impose requirements to preserve and advance universal service, but only on a nondiscriminatory basis." Id. Interpreting §16-233 as "providing municipal entities free access to the communications gain for the purpose of offering competitive telecommunications services" would be "inconsistent with" the principles embodied in the federal statutes cited.[5] Id. It would "create a discriminatory scheme

[5] The authority also found that such an interpretation would be "inconsistent with . . . other aspects of federal law," without specifying which "aspects" it had in mind. Thus, the court is unable to evaluate how such "aspects" figure into the authority's construction of the statute and can give them no weight.

under which a municipality or its assignee is entitled to free, preferential access to the gain to the detriment of other carriers," creating an "uneven playing field and dampen[ing] competition." Id.

Similarly, the authority found, construing the statute as advocated by the appellants would contradict the requirements of General Statutes § 16-247a(a)(2), which requires the authority to "promote the development of effective competition as the means to provide customers with the widest possible choices of [broadband] services." Id.

Because of the "apparent conflict between federal and state laws intended to foster non-discrimination and robust competition and the interpretation advanced by the [appellants]," the authority concluded that §16-233

> must be read as providing a town, city, borough, fire district or the Department of Transportation with the right to occupy and use the Municipal Gain for any purpose of its own, and does not allow for the public or other third-parties to physically connect to a municipal broadband network erected in the municipal gain, nor does it permit the assignment of the right to locate facilities in the municipal gain. Id.

III

The issues raised by the appellants in these consolidated cases represent a thoroughgoing critique of the authority's decision. They are:

1. Whether the petition for a declaratory ruling should have been dismissed by the authority because the petitioners lacked standing to seek a ruling?

2. Whether the authority's construction of § 16-233 to proscribe use of the gain to provide broadband internet service exceeds its statutory authority and is, therefore, invalid?

3. Whether the authority's construction of § 16-233 violates Connecticut's rules of statutory construction?

4. Whether the authority, as an administrative agency, was correct to concern itself with the constitutionality of the appellants' proposed construction of §16-233?

5. Whether the authority's references to the federal communications act were correct and supported its construction of §16-233? Whether a conflict between § 16-233 and General Statutes § 16-247a affects the proper construction of § 16-233?

6. Whether the authority made factual determinations about the effects on competition in the provision of broadband internet

services of the appellants' proposed construction of §16-233 without a hearing at which evidence on this issue might have been presented?

7. Whether the authority made procedural errors that prejudiced appellants in the course of its consideration of the declaratory ruling?[6]

IV

The parties seem to agree that, in construing §16-233, this court is presented with a pure question of law that has not been addressed previously.[7] In such a case the standard of review to be applied has been well stated in *Chairperson, Conn. Medical Examining Bd.* v. *Freedom of Information Comm.*, 310 Conn. 276, 281-83 (2013):

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[6] The CCM on its appeal argues that the authority's construction of § 16-233 violates article second and/or article tenth of the Connecticut Constitution. Because the court finds that the authority's ruling is erroneous on other grounds, it does not consider that these issues must be addressed. "(L)ower courts of limited jurisdiction have been advised to leave the question of constitutionality to a higher appellate court unless the statute is clearly unconstitutional or unless the rights of litigants make it imperative that the court pass upon the constitutional question." *Caldor, Inc.* v. *Thornton*, 191 Conn. 336, 344 (1983).

[7] See, e.g., Brief of the Defendant Public Utilities Regulatory Authority, docket entry # 113, p. 4 (Dec. 7, 2018)(PURA brief).

> Cases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, an agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion . . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference . . . . We have determined, therefore, that the traditional deference accorded to the agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . . [When the agency's] interpretation has not been subjected to judicial scrutiny or consistently applied by the agency over a long period of time, our review is *de novo*. (Emphasis added.)(Citation omitted. Internal quotation marks omitted.)

This standard of plenary review extends to the authority's determination whether it has jurisdiction over the question of the municipalities' use of their free gain under § 16-233 because "an administrative agency which exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly described." *Hall* v. *Gilbert & Bennett Mfg. Co., Inc.*, 241 Conn. 282, 290-91 (1997). At oral argument the authority maintained that the proper standard for reviewing the authority's decision that it has power to regulate use of the free gain is whether the authority abused its discretion in so deciding. That is not the

position taken by the authority in its brief, and the court finds no authority for it in *Town of Manchester* v. *State*, Superior Court, judicial district of New Britain, Docket No. CV 00 0501043, 2001 WL 590033 (May 10, 2001)(*Manchester I)*, the only case cited at argument.

V

The court finds that the petitioners had standing to request the declaratory ruling issued by the authority on May 9, 2018. General Statutes § 4-176 allows "any person" to petition an administrative agency for a declaratory ruling as to "the applicability to specified circumstances of a provision of the general statutes," a formulation that fits the petitioners' request for a ruling as to the construction of § 16-233. It is true, as argued by the CCM, that the language of the authority's regulation addressing such petitions would seem to narrow the permissible petitioners: "Any *interested* person may at any time request an advisory ruling of the commissioners[8] with respect to *the applicability to such person of any statute*, regulation or order enforced, administrated, or promulgated by the commission-

[8] The declaratory ruling of May 9, 2018 was issued by three commissioners of the authority.

ers." Conn. Agencies Regs. § 16-1-114. If there is a conflict between the statute and the regulation, however, the broader terms of the statute must govern.

VI

Section 16-233 by its express terms empowers the authority to regulate only the "location or relocation [on the utility pole or in the underground duct system] of" the free gain enjoyed by a municipality or the department. And, the legislature did not expand the authority's regulatory power in 2013 when it expanded the uses to which municipalities and the department could make of the free gain.

Therefore, the appellants argue, the authority has no business specifying the purposes for which the municipalities may or may not use their gain. Any such regulation is in excess of its statutory authority and, therefore, invalid. "An administrative body must act strictly within its statutory authority, within constitutional limitations and in a lawful manner. . . . It cannot modify, abridge or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant that power." *Castro* v. *Viera*, 207 Conn. 420, 428 (1988).

The authority defended its decision to forbid use of the gain for broadband internet service by reference to a 2001 decision of the Superior Court that confirmed the "broad discretion vested in the DPUC[9] to regulate transmission lines" and its "broad powers to insure safety of the public and the employees of public service companies." *Manchester I*, 2001 WL 590033 *3. The decision in *Manchester I*, however, had nothing to do with the uses to which the town wished to put its free gain but whether the DPUC could require the town to pay the owner of the pole a charge for making their equipment on the pole ready for use.[10] The statutes relied on in the decision, General Statutes §§ 16-243, 16-11 and 16-12 all have to do with the authority's power to regulate the condition of the plant and equipment used by public utilities and to provide for the safety of the public and the utilities' employees. They provide no authority for it to regulate the towns' uses of their free gain.

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[9] The Department of Public Utility Control (DPUC) was the predecessor of the authority.

[10] The owners of the pole, Southern New England Telephone Co. and Connecticut Light & Power Co. attempted to appeal from that aspect of the DPUC's decision that allowed the town to place fiber optic cables in the gain for communication between the locations of different town facilities, but that appeal was untimely. *Manchester I, fn. 2.*

Nor does the Supreme Court's decision in *Town of Greenwich v. Dept. of Public Utility Control*, 219 Conn. 121 (1991). In that case the court was faced with a claim that the DPUC was "without statutory authority to initiate a rate equalization plan . . . permitting the [public service utility company] to raise selectively the rates of discrete classes of customers." Id., 124. General Statutes § 16-19a gave the DPUC plenary power to regulate the rates set by public utilities, and the Court held that "the language of the enabling statute is sufficiently flexible to permit the DPUC to create necessary policies, including rate equalization, to guide its rate-making decisions." Id., 126. The broad language of the *Greenwich* decision apparently relied on by the authority to support its exercise of regulatory power over the towns' use of the free gain applies only to the state's regulatory authority over public service utility companies: "The general purposes of . . . section 16-19 . . . are to assure to the state of Connecticut its full powers to regulate its *public service companies*, to increase the powers of the department of public utility control and to promote local control of the *public service companies* of the state, and said section shall be so construed as to effectuate these purposes." (Emphasis added.) Id., 125-126.

Thus, the *Greenwich* decision does not support the authority's exercise of regulatory power over the towns or the department beyond that expressly provided in § 16-233.

The court agrees with the appellants that, in attempting to limit the use of the free gain by the municipalities, the authority acted beyond its statutory power, and its action was invalid. Ordinarily, this finding alone would be enough to vacate the authority's declaratory ruling. Because this matter is clearly headed toward higher judicial ground, this court will address and decide the other issues raised by the appellants.

VII

Construction of §16-233 as of any other Connecticut statute must begin with consideration of General Statutes § 1-2z:

> The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

Finding no "plain and unambiguous meaning apparent on the face of the statute"; Record p. 69; the authority looked beyond the text of §16-233 to "its relationship with other statutes" to ascertain its meaning. The court fails to see how the permission given to

a town or city by §16-233 "to occupy and use for *any purpose*" its gain on a public utility pole or in an underground communications system can be anything but "plain and unambiguous." Indeed, in finding that the construction of the statute proposed by the appellants is "plausible"; Id.; the authority implicitly finds that the language of the statute means what it says, i.e., that the users of the free gain may employ it to meet any legitimate goal, including providing internet service. The authority's obligation, as a creature of the legislature, was to affirm that interpretation. The law is clear that if the language of a statute is "plain and unambiguous" on its face, there is no need to go beyond the language to discern the statute's meaning. See, e.g., *Centrix Mgt. Co., LLC* v. *Valencia*, 145 Conn. App. 682, 690 (2013).

Instead, the authority created ambiguity where none otherwise exists by finding the conflicting construction proposed by the petitioners equally "plausible."

The right of a town, city or borough to "occupy and use" a free space on utility poles goes back to 1905. At that time the statute specified that the "gain" could be used "for municipal purposes." See attachment B, Brief of the Plaintiff OCC, Docket No. CV 18 6045635, docket entry # 111 (Oct. 31, 2018)(OCC Brief).

There have been two significant amendments in recent history. In 1994 the department was added to the list of users entitled to a free gain, and the requirement that the gain be provided was extended to all public utility poles, not just telegraph and telephone poles, and to underground duct communication systems. The 1994 Act also made the reservation of space for the gain on the pole or in the underground duct system mandatory. Id., attachment C

Finally, there is the 2013 amendment that is the subject of this case. Prior to that amendment the gain was to be used for "municipal and state signal wires." Now it can be used "for any purpose."

The authority in its decision paid no attention to the words of the statute, made no attempt to discern their meaning. Had it consulted the dictionaries it would have found that the word "any" means "unlimited in amount, number or extent"; Merriam-Webster's Collegiate Dictionary (10th ed.); and that purpose means "something set up as an object or end to be attained." Id. The statute now contains no words of limitation, such as "for municipal purposes," as appeared in the original 1905 version. So, the authority's conclusion that § 16-233 in its present form

limits use of the gain by a town, city, borough, fire district or the department "for any purpose of its own, and does not allow for the public or other third-parties to physically connect to a municipal broadband network erected in the municipal gain"; Record p. 70; reads the statute as it was in 1905 not as it is in 2019 and cannot be the proper construction of the statute.

Furthermore, the authority's construction renders the 2013 amendment to § 16-233 meaningless, in violation of the presumption that the legislature does not intend to enact meaningless provisions. See, e.g., *State* v. *Gibbs*, 254 Conn. 578, 602 (2000). Since the 2000 decision of the authority's predecessor, the DPUC, it has been clear that municipalities may use their gain to erect communications networks that enabled different town agencies to share voice, video and data traffic. *Manchester I*, 2001 WL 590033, *1. And, this was when the statute permitted use of the gain only for "municipal and state signal wires." Despite this limiting language, in 2000 the DPUC found that a town could use its free gain to establish a communications network for its own use, the same finding the authority made in its decision of May 9, 2018 after the language of the statute had been broadened to allow use of the gain "for any purpose."

The DPUC's decision had been settled law for thirteen years when the legislature amended § 16-233 to broaden the uses to which the free gain may be put. Since the legislature is presumed to know the state of the law when it enacts statutes; *State* v. *Dabkowski*, 199 Conn. 193, 201 (1986); it cannot have intended only to preserve the status quo. Yet that is the effect of the authority's construction.

Notably, the authority did not find an ambiguity arising out of a supposed conflict between the first sentence of §16-233, allowing use of the gain "for any purpose," and the third sentence, which reserves the gain "for use by the town, city, borough, fire district or the Department of Transportation." In their briefs on this appeal; PURA brief, 20; Brief of Intervenors, docket entry #114, 15 (Dec. 7, 2018); the authority and the intervenors resurrect this argument, which appeared in the authority's draft decision; Record p. 36; and was abandoned in its final decision. Just as a reviewing court may not base its decision on an issue the administrative agency did not address; *Windham* v. *Freedom of Information Comm.*, 48 Conn. App. 522, 527 (1998); the agency cannot seek review of its decision on a basis other than that on which it actually decided the case before it.

Therefore, the decision for the court to review is the authority's decision that, if construed literally to give municipalities the right to use their free gain "for any purpose", including for the provision of broadband internet service to their residents and businesses, §16-233 conflicts with federal and state statutes intended to promote equality among competitors in providing such service.

The court concludes that the authority's construction of § 16-233 violates the "plain meaning rule" legislated in § 1-2z.[11]

VIII

Rather than construing § 16-233 according to its plain meaning the authority went directly to a consideration of how it related to other statutes. Its stated goal in doing so was to avoid a "constitutionally precarious" construction of the statute. Record p. 69. Though not expressly stated in its decision, it is the supremacy clause of the federal Constitution; article VI, clause two;[12] that the authority apparently feared could be

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[11] Since the authority did not find the meaning of the text of § 16-233 to be "plain and unambiguous," it did not have occasion to consider whether such a construction would yield "absurd or unworkable" results.

[12] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be

violated by § 16-233, as amended in 2013, if construed as proposed by the appellants. The authority went on to find that construing the statute to allow municipalities to provide broadband internet service to the public via their use of the gain would violate two federal statutes "intended to foster non-discrimination and robust competition" in the provision of such service. Record p. 70.

It is clear, however, from decisions of both the Supreme Court and the Appellate Court that the authority, as an administrative agency, had no business considering the constitutionality of § 16-233. In *Tufaro* v. *Pepperidge Farm, Inc.*, 24 Conn. App. 234 (1991), the Appellate Court reviewed a decision of a worker's compensation commissioner that an employer had to provide a claimant's dependents with health insurance coverage for as long as the claimant was receiving worker's compensation. The employer claimed before the commissioner and on appeal to the compensation review division that the statute on which the commissioner had based his decision was unconstitutional because its provisions had been preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA). Id., 235-36. Both the worker's compensation commissioner who made the initial

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bound thereby, any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding."

coverage decision and the compensation review division expressly declined to consider the constitutional issue "because their quasi-judicial power did not empower them to decide such a question." Id.

The Appellate Court approved. "It is well settled that the commissioner's jurisdiction is confined by the worker's compensation act and limited by its provisions. . . . It is the duty of the judiciary, however, to determine the constitutionality of a state statute. . . . Thus, neither the commissioner nor the compensation review division had been granted authority to consider constitutional issues . . . ." (Internal quotation marks and citations omitted.) Id., 236-37.

In 1983 the Supreme Court had decided the case relied on by the Appellate Court in *Tufaro*. In *Caldor, Inc.* v. *Thornton*, 191 Conn. 336 (1983), it was the board of mediation and arbitration that declined to consider the constitutionality of a statute; viz., General Statutes § 53-303e, that prohibited the discharge of an employee for his refusal to work on his Sabbath day. "Our threshold inquiry is directed toward whether it was incumbent upon the board to consider the constitutional issue. . . . The board expressly declined to make such a determination, concluding that

its quasi-judicial power does not encompass a decision as to the constitutionality of § 53-303e. We agree." Id., 342-343. "Whether a statute is in conflict with the state constitution is the duty of the judiciary to determine. . . . In the present case the board, as an administrative agency, has not been granted the authority to consider constitutional issues." Id., 344.

The law is clear, therefore, that the authority overstepped its bounds as an administrative agency in deciding that a construction of § 16-233 that would allow a municipality to use its free gain to provide internet service to its residents and businesses would violate the supremacy clause of the United States Constitution.

IX

Although the authority's consideration of the constitutionality of § 16-233 exceeded its powers and was invalid, the court will, nevertheless, consider the substance of its decision of that issue.

The authority grounded its decision that it was required to proscribe municipal use of the free gain to provide broadband internet service to its residents and commercial establishments

within its boundaries on its interpretation of two federal and one state statute. Record p. 70.

Appellants attack the authority's reliance on certain provisions of the two federal statutes, 47 U.S.C. 224 (e) and (f) and 47 U.S.C. 253 (a), (b) and (d). The former requires that charges by utilities for pole attachments be "just, reasonable and nondiscriminatory"; 47 U.S.C. 224 (e)(1); and that a utility shall provide "a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right of way owned or controlled by it." The latter prohibits state or local statutes or regulations that prohibit the "ability of any entity to provide any interstate or intrastate telecommunications service"; 47 U.S.C. 253 (a); allows state regulations on telecommunications service but only on a "competitively neutral basis"; 47 U.S.C. 253 (b); and empowers the federal communications commission (commission) to "preempt the enforcement of" statutes or regulations that violate subsections (a) and (b).

The authority found in these federal statutes a Congressional intent "to foster competition among telecommunications providers and prevent disparate treatment of one provider over another." Record p. 69. "Providing municipal entities free access to the

communications gain for the purpose of offering competitive telecommunications services . . . appears to be inconsistent with these principles . . . ."; Id. p. 70; and "would create a discriminatory scheme under which a municipality or its assignee is entitled to free, preferential access to the gain, to the detriment of other carriers." Id..

In the brief supporting its appeal the OCC convincingly demonstrates that 47 U.S.C. § 253 applies only to the provision of *telecommunications services* and that a recent decision of the commission provides that *internet service* does not fit within the statutory definition of telecommunications services. OCC Brief, pp. 18-19. Accord: *National Cable & Telecomms. Assn.* v. *Brand X Internet Services*, 545 U.S. 967, 973-74, 975-76 (2005). Since 47 U.S.C. § 253 applies only to telecommunication services and what is at stake here is the provision of internet service, that statute provides no basis for the authority's construction of § 16-233 to prohibit a municipality's use of its free gain to provide internet service.

Nor does 47 U.S.C. § 224. The pole attachments regulated by that section are those intended to provide cable television or telecommunications services. 47 U.S.C. § 224 (a)(4). The pole

attachments contemplated by the towns are neither; they are pole attachments intended to provide internet services. So, the restrictions imposed by §§ 224 (e) and (f), cited by the authority as justifying its decision, simply do not apply to pole attachments for the purpose of providing internet service.

The case of *Gulf Power Co.* v. *Federal Communications Commission*, 208 F.3d 1263, 1276 (11th Cir. 2000), recognized this distinction when it found that "(i)nternet service does not meet the definition of either a cable service or a telecommunications service. Therefore, the 1996 Act does not authorize the [commission] to regulate pole attachments for internet service."[13]

The appellants' analysis is not persuasively rebutted by the authority. Of course, the authority may continue to address safety concerns that are raised by the installation of equipment or wiring on the utility poles regardless of the purpose of the installation. That continuing ability does not detract from the

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[13] This decision was reversed by the Supreme Court under the name *National Cable & Telecomms. Assn.* v. *Gulf Power Co.*, 534 U.S. 327, 338-39 (2000), but only because that Court found that the pole attachments at issue were used to provide *both* cable television and internet service and thus were attachments made by a cable television system.

conclusion that 47 U.S.C. § 253 does not provide a basis for the authority to regulate the provision of internet service.

Nor does the authority successfully distinguish the present situation, when the commission has interpreted the applicable federal statutes to place internet service beyond the authority's regulatory purview, from the situation in 2004, when the authority's predecessor, the DPUC, ruled that "(b)ased on the applicable law, it is clear that the Department does not have authority over internet traffic." OCC Brief, Attachment I, DPUC Decision, *Application of Southern New England Telephone Co. for a Declaratory Ruling Regarding the Town of Manchester's Use of its Private Telecommunications Network,* DPUC docket # 04-02-15, p. 3 (Aug. 18, 2004).

Finally, the authority found that allowing municipalities to use their free gain to provide internet service to residents and businesses would conflict with a single state statute. General Statutes § 16-247a spells out certain goals of the state in providing "affordable, high quality telecommunications services", among which is "the development of effective competition as a means of providing customers with the widest possible choice of services . . . ." § 247a (a)(2). The authority found that allowing

municipalities to use their free gain to provide internet service to residents and businesses would conflict with this statutory goal in that it would provide them with "preferential access to utility poles" and would therefore "contradict the requirements of General Statutes § 16-247a (a)(2)." Record p. 70.

First, as is obvious from the language of § 16-247a, it is concerned with the provision of "telecommunications services," and, as the immediately previous discussion shows; see pp. 18-19, supra; at least as far as the commission is concerned, the internet service proposed to be provided by municipalities via use of their free gain does not qualify as a "telecommunications service." The authority's predecessor, the DPUC, recognized this distinction and its lack of jurisdiction over internet service in the 2004 decision also discussed previously. See p. 19, supra.

Moreover, "[it is a well settled principle of construction that specific terms governing the specific subject matter will prevail over general language of the same or another statute which might otherwise prove controlling. . . .The provisions of one statute which specifically focus on a given problem will always, in the absence of express contrary legislative intent, be held to prevail over provisions of a general statute more general in its

coverage." *Housatonic Railroad Co.* v. *Comm. of Revenue Services*, 301 Conn. 268, 302 (2011). General Statutes § 16-233 must prevail over § 16-247a when the question before the administrative agency is which one governs the specific subject matter of the proper use of the municipal gain. The authority's favoring the latter statute over the former in its construction of § 16-233 was error.

X

As the court has held in this memorandum, the authority's construction of § 16-233 to proscribe a municipality's provision of internet service to its residents and businesses is the product of several errors of law. In addition, it is based on factual assumptions for which there is no evidence in the administrative record. General Statutes § 4-176 (g) allows for a hearing to be conducted in connection with a petition for a declaratory ruling, but the authority conducted no such hearing in this case.

The authority's restrictive construction of § 16-233 arose out of concerns over how a literal construction would affect the provision of internet services in Connecticut:

> The Authority is concerned that permitting the use of the free Municipal Gain for the provisions (sic) of competitive broadband services would create a discriminatory scheme under which a municipality or its assignee is entitled to free, preferential access to the gain, to the detriment of other carriers. This scenario

> also appears to create an uneven playing field and dampens competition . . . . Record p. 70.

These concerns are in turn based on assumptions unsupported by findings as to several critical factual questions. What is the state of the competitive market for providing internet service in Connecticut? Does it vary from place to place within the state?[14] What is the nature and degree of the presumed detrimental effect on other internet providers and the competitive market of the municipalities' use of their gain to provide similar service? Would allowing municipalities to use their gain to provide internet service within their boundaries, in fact, "dampen competition" in the provision of such services in the state?. How much of a "preference" would municipalities receive by their use of the gain to provide internet access? To what degree does the cost to commercial internet providers like petitioners of attaching to utility poles contribute to their overall cost in providing internet service?

The court concludes that, in the presence of this factual lacunae, this case would have had to be remanded to the authority for it to conduct the necessary fact-finding process to inform a

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[14] This is an important issue because the authority's ruling applies to large cities like Hartford as well as small rural towns like Sharon.

decision whether a restrictive interpretation of § 16-233 is necessary to avoid the anti-competitive effects that concerned the authority.[15] Because the authority's construction of the statute is the product of several errors of law, however, a remand is unnecessary under the circumstances of this case.

XI

In addition to the procedural matters already addressed by the court - petitioners' standing to seek a declaratory ruling; see pp. 8-9, supra; and the need for an evidentiary record to support the authority's findings of fact regarding the effects of granting municipalities the right to offer internet service via the free gain; see pp. 21-22; - the appellant CCM argues that the authority committed several other procedural errors that should invalidate its proceeding and ruling:

1. Taking administrative notice of the record in an earlier declaratory ruling proceeding involving the same issues as this matter;

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[15] It may or may not be good public policy for towns and cities to be able to offer their residents and businesses broadband internet service via their use of the free gain provided by § 16-233. That is a judgment for the legislature to make, however, not the authority by way of an overly narrow construction of the statute.

2. Issuing a "misleading" notice of proceeding that inhibited entities that were not petitioners from seeking and obtaining party status;

3. Granting intervenor rather than party status to towns; and

4. Extending the deadline for issuing the declaratory ruling.

The court has reviewed the arguments advanced by the CCM and the authority and concludes that, to the extent that the authority erred in any of these particulars, the CCM has failed to meet its burden of showing that any one of them or all of them taken together prejudiced its substantial rights or those of any other party. See General Statutes § 4-183(j). *Tele Tech of Conn. Corp.* v. *Dept. of Public Utility Control*, 270 Conn. 778, 813 (2004).

XII

The final declaratory ruling issued by the authority on May 9, 2018:

1. Exceeded the statutory power of the authority and is invalid;

2. Violated the "plain meaning rule" of statutory construction;

3. Overstepped the authority's bounds in ruling on the constitutionality of a proposed construction of § 16-233;

4. Is based on a faulty analysis of the relationship between § 16-233 and federal and state statutes concerning the provision of telecommunications services; and

5. Is based on factual assumptions unsupported by any evidence in the record.

Pursuant to General Statutes § 4-183 (j), the court finds that substantial rights of the appellants have been prejudiced because the declaratory ruling of the authority is (1) in violation of statutory provisions; (2) in excess of its statutory authority; (3) made upon unlawful procedure; and (4) arbitrary and capricious.

Accordingly, the appeal is SUSTAINED. The declaratory ruling of the authority is VACATED.

No costs are taxed.

BY THE COURT

Joseph M. Shortall
Judge Trial Referee